No. 42529-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RUSSELL DAVID HOMAN,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Response to Appellant's Supplemental Brief and the Amicus Curiae Brief

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JONATHAN L. MEYER
Lewis County Prosecuting Attorney

By: _____
SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor

Chehalis, WA 98532-1900
(360) 740-1240

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I. ISSUES

A. Does RCW 9A.40.090 criminalize protected speech and conduct and is therefore unconstitutionally overbroad?

B. Homan cannot raise a facial challenge to RCW 9A.40.090 at this point in the proceedings, it is beyond the scope of remand.

II. STATEMENT OF THE CASE

This case has been extensively briefed to this Court and the Washington State Supreme Court. The State will rely upon its prior briefing in regards to the facts of this case. The State will supplement the facts, if necessary, in the briefing below.

This Court in Homan's direct appeal, *State v. Homan*, 172 Wn. App. 488, 290 P.3d 1041 (2012), held that the State had not presented sufficient evidence to sustain a conviction for Luring, reversed the conviction and remanded the case back to the trial court to dismiss with prejudice. The State filed a petition for review with the Supreme Court. The Washington State Supreme Court reversed this Court, holding that the State had presented sufficient evidence to sustain the conviction for Luring and remanded the case back to this Court to determine if RCW 9A.40.090 is overbroad. *State v. Homan*, 181 Wn.2d 102, 330 P.3d 182 (2014). This Court requested supplemental briefing on the matter. The

State is responding to both the Appellant's Supplemental Brief and the Amicus Brief in this response.

III. ARGUMENT

A. RCW 9A.40.090 DOES NOT CRIMINALIZE CONSITUTIONALLY PROTECTED SPEECH AND IS THEREFORE NOT OVERBROAD.

RCW 9A.40.090, the statute criminalizing luring, is not unconstitutionally overbroad because it does not criminalize a substantial amount of protected speech. Therefore, Homan's facial challenge to RCW 9A.40.090 fails.

1. Standard Of Review.

Constitutional challenges are reviewed de novo. *Lummi Indian Nation v. State, 170 Wn.2d 247, 257-58, 241 P.3d 1220 (2010*).

2. RCW 9A.40.090 Is Not Unconstitutionally Overbroad Because It Does Not Infringe Upon Protected Speech And Conduct.

A statute is presumed constitutional and it is the burden of the party attacking the statute to prove the statute is unconstitutional beyond a reasonable doubt. *City of Bellevue v. Lee*, 166 Wn.2d 581, 585, 210 P.3d 1011 (2010), *citing Island County v. State*, 135 Wn.2d 141, 146, 955 P.2d 377 (1998). The First Amendment, which demands that Congress shall not make

any laws abridging a person's right to freedom of speech, "is applicable to the States through the Fourteenth Amendment." *State v. Holcomb*, 180 Wn. App. 583, 589, 321 P.3d 1288 (2014), *citing Virginia v. Black*, 538 U.S. 343, 358, 123 S. Ct. 1536, 155 L.Ed.2d 535 (2003). A statute is unconstitutionally overbroad if it infringes on a substantial amount of constitutionally protected speech. U.S. Const., amend. I; *United States v. Williams,* 553 U.S. 285, 292, 128 S. Ct. 1830, 170 L.Ed.2d 650 (2008). A person may make an overbreadth challenge even if the statute could be constitutional as applied to the person because an overbreadth challenge is a facial challenge. *City of Bellevue v. Lorange*, 140 Wn.2d 19, 26, 992 P.3d 496 (2000).

A person challenging a statute for overbreadth "bears the burden of demonstrating, 'from the test of [the law] and from actual fact,' that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122,123 S. Ct. 2191, 156 L.Ed.2d 148 (2003) (citation omitted) (brackets original). While it is important that laws do not deter people from engaging in their right to constitutionally protected speech, "invalidating a law that in some of its applications is perfectly constitutional-particularly a law directed at conduct so antisocial that it has been made criminal", is a harsh remedy,

therefore, the United States Supreme Court has required "that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States v. Williams*, 553 U.S. at 292-93, *citing Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485, 109 S. Ct. 3028, 106 L.Ed.2d (1989); *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L.Ed.2d 830 (1973) (emphasis original). The United States Supreme Court has also recognized the consequences of striking down a statute for facial invalidity and stated "that the overbreadth doctrine is 'strong medicine' and have [therefore] employed it with hesitation, and then 'only as a last resort.'" *New York v. Ferber*, 458 U.S. 747, 769, 102 S. Ct. 3348, 73 L.Ed.2d 1113 (1982) (citation omitted).

When evaluating an overbreadth challenge the reviewing court first analyzes the statute to determine if it reaches constitutionally protected speech. *State v. Dana*, 84 Wn. App. 166, 174, 926 P.2d 344 (1996) *citing State v. Halstien*, 122 Wn.2d 109, 122-23, 857 P.2d 270 (1993). If the court concludes the statute does reach constitutionally protected speech it next determines "whether the amount of protected conduct the statute reaches is

'real and substantial'…in contrast to the statute's plainly legitimate sweep." *Id.* at 174-75 (citation omitted).

Homan and Amicus argue RCW 9A.40.090 is unconstitutionally overbroad because it criminalizes statements that are friendly invitations, statements to aid a child in finding an item, statements made in jest, genuine offers to help, friendly invitations between children, and statements that are misunderstood as orders. Homan also asserts that the affirmative defense laid out in section two of the luring statute is not a solution to the overbreadth issue. Finally, Homan, once again, urges the Court to not follow Division One's decision in *Dana.*

The luring statute is not substantially overbroad and is therefore constitutional. While the statute may reach some constitutionally protected speech, the amount of speech is not substantial and real in contrast to the statute's plainly legitimate sweep.

> A person commits the crime of luring if the person:
>
> (1)(a) Orders, lures, or attempts to lure a minor or a person with a developmental disability into an area or structure that is obscured from or inaccessible to the public or into a motor vehicle;
>
> (b) Does not have the consent of the minor's parent or guardian of the person with a developmental disability; and

> (c) Is unknown to the child or developmentally disabled person.
>
> (2) It is a defense to luring, which the defendant must prove by a preponderance of the evidence, that the defendant's actions were reasonable under the circumstances and the defendant did not have any intent to harm the health, safety, or welfare of the minor or the person with the developmental disability.

RCW 9A.40.090. The crux of Amicus' and Homan's overbreadth challenge is that innocent invitations or necessary orders to a minor or developmentally disabled person would subject a person to prosecution under the statute. This is an oversimplification of RCW 9A.40.090 and it does not take into account the affirmative defense set forth in subsection two.

a. The definition of luring is not vague.

Amicus asserts that the lack of a statutory definition of luring contributes to RCW 9A.40.090's overbreadth. While the statute is silent about a definition of luring this does not lead the statute to be overbroad. *See* RCW 9A.40.090. The definition relied upon by the courts is not vague and does not support Amicus and Homan's overbreadth argument.

If the statute fails to provide a definition for a term then the courts look to the standard dictionary definition of the word. *State v. Stratton*, 130 Wn. App. 760, 764, 124 P.3d 660 (2005). The

Washington State Supreme Court relied upon the dictionary definition of lure to support its decision to find sufficient evidence in Homan's case. *Homan*, 181 Wn.2d 102, 108, 330 P.3d 182 (2014), *citing* Webster's Third New International Dictionary, 1347, 1588 (2002). A dictionary definition of lure had previously been adopted by Division One in *Dana* when dealing with an overbreadth and vagueness argument attacking the luring statute. *Dana*, 84 Wn. App. at 171.

Luring requires there be an order or an invitation to a minor or developmentally disabled person which is accompanied by an enticement. *Dana*, 84 Wn. App. at 176. Webster's even state's "lure may mean to draw into danger, evil, or difficulty by ruse or wiles." Webster's Third New International Dictionary, 1347. The legitimate reach of the luring statute is to prevent children and those with developmental disabilities from being taken to a secluded location by strangers who intend them harm. *See* RCW 9A.40.090; *Dana*, 84 Wn. App. at 175. The definition, found in the dictionary and adopted by the courts is not vague and does not contribute to the overbreadth of RCW 9A.40.090.

b. The affirmative defense sufficiently narrows the scope of the luring statute.

Homan argues that an invitation to go to one's home from one child to another with the "enticement" of a sugary treat would violate RCW 9A.40.090, which he asserts exemplifies the overbreadth of the statute by criminalizing constitutionally protected speech. The Court has previously held that "[e]ven if some protected expression would fall prey to the statute, under *Ferber*, if the statute's legitimate reach far surpasses its arguably impermissible applications, the statute is not overbroad." *State v. Myers*, 133 Wn.2d 26, 34, 941 P.2d 1102 (1997).

The affirmative defense found in subsection two of the luring statute defines the purpose of the statute and what conduct does not constitute luring. *See* RCW 9A.40.090(2). If the person's actions are reasonable under the circumstances and there was no intent to harm the welfare, safety or health of the minor or person with the developmental disability then the person has not committed the crime of luring. RCW 9A.40.090(2).

The luring statute has a large plainly legitimate sweep. *Dana,* 84 Wn. App. at 175. "The impact on protected speech is minimal because a mere invitation…is not sufficient…the invitation must include some other enticement or conduct constituting

enticement." *Id.* Being able to hypothetically conceive of impermissible applications of a statute is not a sufficient justification to render it susceptible to a challenge for overbreadth. *State v. Aljutily*, 149 Wn. App. 286, 293, 202 P.3d 1004 (2009), *citing United States v. Williams*, 553 U.S. at 303. Homan and Amicus' illustrations of potential scenarios where RCW 9A.40.090 would infringe on protected speech are not sufficient enough to render the statute unconstitutionally overbroad. This Court, as the court in *Dana* did, should uphold the statute as constitutional. *See, State v. Dana,* 84 Wn. App. at 177.

B. HOMAN CANNOT RAISE AN AS-APPLIED CHALLENGE, IT IS BEYOND THE SCOPE OF THE REMAND.

Homan argued for the first time to the Supreme Court, and maintains the argument in his supplemental briefing to this Court, that RCW 9A.40.090 is overbroad as applied to him. Homan argues to this Court that there was no evidence presented that his conduct was a "true attempt" and there was no evidence that Homan's words would be taken by a reasonable person to be a serious attempt to entice a child to a secluded location.

Homan never raised an as-applied challenge to RCW 9A.40.090 to this Court during initial briefing. Homan's opening brief did not argue an as-applied challenge to RCW 9A.40.090 and he

wrote no reply to the State's response brief. Homan first raised this argument in the second supplemental briefing to the Supreme Court after they called for briefing on the overbreadth challenge. To argue an as-applied challenge to the luring statute now is beyond the scope of the remand. The Supreme Court stated, "We reverse the Court of Appeals and remand for a determination of whether *RCW 9A.40.090* is unconstitutionally overbroad in violation of the *First Amendment* and for further proceedings consistent with this opinion." *Homan*, 181 Wn.2d at 110-11. At this point Homan is foreclosed at arguing an as-applied challenge. The Supreme Court has previously held, "We consider those points not argued and discussed in the opening brief abandoned and not open to consideration on their merits. In addition a contention presented for the first time in the reply brief will not receive consideration on appeal." *Fosbre v. State*, 70 Wn.2d 578, 583, 424 P.2d 901 (1967). Therefore, this court should not consider the as-applied challenge and strike this portion of Homan's brief.[1]

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[1] The State will be prepared to argue the facial challenge if required in other briefing or at oral argument if this Court so requests. The State will maintain throughout the remand that addressing a facial challenge is improper at this point in the proceedings.

IV. CONCLUSION

RCW 9A.40.090 does not violate the First Amendment of the United States Constitution. The luring statute is not overbroad. Further, this Court should find that Homan is barred from raising a facial challenge to RCW 9A.40.090. For the foregoing reasons, this court should affirm Homan's conviction for luring.

RESPECTFULLY submitted this 24th day of December, 2014.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:_____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. RUSSELL DAVID HOMAN, Appellant.	No. 42529-7-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On December 24, 2014, the appellant was served with a copy of the **Respondent's Response to Appellant's Supplemental Brief and the Amicus Curiae Brief** by email via the COA electronic filing portal to Jodi Backlund, attorney for appellant, at the following email address: Backlundmistry@gmail.com, and to the Attorneys for Amicus Curiae by depositing same in the United States Mail, postage pre-paid, to La Rond Baker of the ACLU of Washington Foundation Attorneys at 901 Fifth Avenue, #630, Seattle, WA 98164 and to Venkat Balasubramani of Focal PLLC at 800 Fifth Avenue, #4100, Seattle, WA 98104.

DATED this 24th day of December, 2014, at Chehalis, Washington.

Teri Bryant

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

December 24, 2014 - 11:11 AM

Transmittal Letter

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Comments:

No Comments were entered.

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